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Order 2000-10-23

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 20th day of October, 2000

SERVED Oct. 20, 2000

**Petition for Rulemaking and
Third-Party Complaint of
Donald L. Pevsner, Esq.**

DOCKET OST 97-2061

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DISPOSITION OF PETITION AND COMPLAINT

By this order, we affirm that 49 U.S.C. §41712 prohibits sellers of air transportation from deceiving consumers about the price of air transportation, and we put airlines and travel agents on notice of their compliance responsibilities. In particular, as we explain below, an airline is violating the statute and risking enforcement action whenever the following three conditions occur: (1) a telephone caller requests the lowest fare from its reservation agent, (2) the caller could, via the airline's Internet site, get a fare from the airline that is lower than any fare that the reservation agent can sell, and (3) the caller is not alerted to the possibility of a lower Internet fare. An airline will avoid the risk of deceiving consumers in this manner if it informs all telephone callers that in some instances its lowest fares are only available via the Internet. Because the statute clearly prohibits much of the conduct that Donald L. Pevsner seeks in his petition for rulemaking in Docket OST-97-2061 to have us prohibit by rule, we dismiss his petition.

Mr. Pevsner also asks us to take enforcement action pending our adoption of the rule that he seeks. As discussed below, the situation that Mr. Pevsner cites does not warrant enforcement. When we have sufficient evidence that an airline is deceiving consumers regarding the availability of its lower fares, however, we can and will take steps to stop this practice.

The Petition and Complaint

Mr. Pevsner asks us to adopt a rule that would bar airlines from allowing their own reservations agents or their appointed travel agents to represent to telephone consumers that they are selling the lowest available fares in a city-pair market when in fact the airlines are making lower fares available via the Internet.¹ Mr. Pevsner complains that these sellers do not currently disclose special Internet-only fares to telephone customers who request airlines' lowest fares. Through this practice, in Mr. Pevsner's view, airlines are violating 49 U.S.C. §41310(a), which provides as follows:

PROHIBITION.—An air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination.

Mr. Pevsner also believes this practice to be unfair and deceptive in violation of 49 U.S.C. §41712, which prohibits unfair and deceptive practices and unfair methods of competition in air transportation and its sale. He cites the following example: in the fall of 1996, Cathay Pacific promoted its new single-plane service from New York/Vancouver to Hong Kong by offering a round-trip New York-Hong Kong fare of \$729 to Internet users only. The lowest round-trip fare available from the carrier's reservation agents or listed in travel agents' Computer Reservations Systems was \$1,230. In addition, the Internet offer included a free bonus round-trip ticket from New York to Vancouver, good for one year from the date of purchase of the Hong Kong ticket. A telephone customer requesting the lowest fares on Cathay Pacific for New York-Hong Kong service and New York-Vancouver service as well would pay well over twice as much as the Internet customer for the same transportation. Mr. Pevsner wants us to require the airlines to disclose to telephone customers, both directly through their reservations agents and indirectly through travel agents, when lower fares are available through the Internet. Ideally, he would also have them disclose the lower fares themselves.

Aside from the issue of disclosure, Mr. Pevsner maintains that under 49 U.S.C. §§41310(a) and 41712, airlines should not be permitted to charge more for air transportation purchased by telephone from their own reservations agents than for air transportation purchased via the Internet. Although he

¹ In addition to offering low Internet fares via their web pages, a number of carriers are now regularly using e-mail to offer special discount fares directly to subscribers as well.

would also prefer that airlines make the low Internet fares available through travel agents as well, he recognizes that the resulting commission expenses might mean higher fares for all distribution channels.

As noted, Mr. Pevsner also asks us to take enforcement action pending adoption of the rule he seeks against airlines that engage in the practice he seeks to have banned.

IATA's Response

IATA filed an answer in opposition to Mr. Pevsner's petition and complaint. IATA denies that failure to ensure that telephone customers are informed when the lowest fares in a market are available only via the Internet violates the aviation statutes. Noting that the Department has never held that a seller of air transportation has an affirmative duty to disclose fares available through other distribution channels, IATA maintains that we should continue to rely on market forces to determine how airlines distribute their services. Regulating the dissemination of information about fares, in IATA's view, would prove to be a complicated undertaking, since fares vary according to many other factors beside the distribution channel used. IATA believes that relying on market forces, as the Department has always done, means that consumers who seek not only the best value in air transportation but the best channels for obtaining the best value will discover if a sales outlet is misrepresenting fares or services and will stop using it. IATA cautions that the rule Mr. Pevsner seeks would discourage airlines from experimenting with new means of distribution, thereby limiting their ability to offer lower fares, to the detriment of the very consumers that Mr. Pevsner seeks to help.

As for the complaint, IATA argues that Mr. Pevsner has not supported his request for relief with any precedent. Further, given that anyone with access to a computer, a modem, and a telephone can buy the low Internet fares, IATA denies that Mr. Pevsner has provided sufficient evidence of any actionable misrepresentation.

Disposition and Analysis

We will dismiss Mr. Pevsner's petition and complaint for the reasons stated below, but we will also take this opportunity to remind airlines and travel agents of their respective statutory responsibilities not to deceive consumers. Under 49 U.S.C. §41712, which prohibits deceptive practices in the sale of air transportation, no special or additional rule is necessary to prohibit either type of telephone seller from actively deceiving callers about the lowest fares in a city-pair market.

1. Airline Reservation Agents

An airline's reservation agents function as the airline itself in its capacity as a seller of air transportation. Under §41712, it is deceptive and hence illegal for an airline's reservation agent to quote or sell a fare to a consumer who requests the lowest fare in a city-pair market if, in fact, that fare is not the lowest fare for the service at issue that the airline offers directly to consumers. This conduct is deceptive and hence a violation of §41712 even if the particular agent involved happens not to know of the lower fare. Thus, when a telephone caller asks an airline's reservation agent for the lowest fare, the agent who merely quotes the lowest fare that he or she can sell—and does not tell the caller that a lower fare may be available via the Internet—is taking the risk of violating §41712. This agent—or, more precisely, the airline—is violating §41712, and the airline is thus subject to enforcement action under the statute, whenever a lower Internet fare does exist.²

Airlines can avoid violating §41712 if they alert telephone callers to the possibility of lower fares via other channels. An airline may do this by playing a recorded message for all callers before connecting them to reservation agents that says the following (or words to the same effect):

[Airline X] sometimes offers fares that are lower than those available from our reservations agents over the Internet or by e-mail to subscribers.

If it prefers, the airline may also avoid violating the statute by having its reservations agents make this disclosure in the course of quoting fares to callers requesting the lowest fare: *e.g.*, "A lower fare than the one(s) I have quoted may be available through [Airline X's] Internet site."

In our judgment, to require the more detailed disclosure by airlines' reservation agents that Mr. Pevsner seeks would be contrary to the public interest, as would requiring airlines to make their low Internet fares available through their reservation agents. The pro-competitive policy directives in 49 U.S.C. §40101 allow airlines to choose the channels for distributing their

² The example that Mr. Pevsner cites concerning Cathay Pacific's promotional fare does not include concrete evidence that a consumer called the carrier on a day when he or she could have gotten a lower fare through the Internet and was not informed of the possibility of a lower Internet fare. Thus, we cannot conclude that enforcement action would be justified.

services as well as the prices and terms of sale for different channels, subject, of course, to the antitrust laws that govern firms in other unregulated industries. If airline reservation agents were required to mention and quote lower Internet fares to telephone callers whenever such fares are available for the requested city-pair, the time necessary for these agents to retrieve this information and then give it to the caller would raise the airlines' costs, with the increase ultimately passed on to the consumer. Such a requirement might also deter airlines from offering the lower fares at all. We do not agree with Mr. Pevsner that either airlines' reservation agents' failure to specify lower Internet fares to telephone callers or airlines' selling certain fares only via the Internet amounts to "unreasonable discrimination" within the meaning of 49 U.S.C. §41310(a), as access to the Internet is now available to virtually anyone. We likewise do not agree that either of these practices in and of itself constitutes an unfair or deceptive practice within the meaning of 49 U.S.C. §41712.

2. Travel Agents

The responsibilities of travel agents differ from those of airlines' reservations agents due to differences between the two types of telephone seller. A travel agency, unlike an airline's reservation agent, is an agent in the legal sense: it is the appointed agent of the airline, its principal, and it does not function as the airline itself. A travel agency will typically have agency agreements with many airline principals, not just one, although some travel agencies may not represent all airlines. Consumers should be aware of these differences between travel agents, who are employed by travel agencies, and airlines' reservations agents.

Under §41712, when a telephone caller asks a travel agent for the lowest fare in a city-pair, the travel agent must quote the lowest fare that he or she is able to sell as an agent of the carrier: to do otherwise is deceptive.³ Section 41712 does not, however, make a travel agent responsible for knowing or informing consumers of fares that the agency is not authorized to sell as the carrier's agent. Thus, just as a travel agent is not violating §41712 by not informing a telephone caller of lower fares offered by airlines that are not the agency's airline principals, neither is the agent violating §41712 by not informing the caller that any of the agency's airline principals is or may be offering lower fares via the Internet. As in the case of airlines' reservation agents, we think that to require travel agents to disclose lower Internet fares as Mr. Pevsner

³ See 14 CFR §399.80(f), which expressly identifies travel agents' misrepresentation of fares as a deceptive practice.

requests would be contrary to the public interest. Mr. Pevsner himself recognizes that airlines' commission expenses would rise if they were required to sell low Internet fares through travel agents and that fares would rise in turn. The same would hold true if airlines were required to provide information on Internet fares to travel agents. Furthermore, travel agencies' costs would rise as well due to the time it would take their employees to retrieve this information and then give it to telephone callers, which would also cause fares to rise.

Finally, in our view, §41712 does not require either airlines' reservation agents or travel agents to inform consumers of discount fares set by and only available from third-party sellers such as consolidators or discount agents.

ACCORDINGLY, we dismiss the petition for rulemaking and third-party complaint of Donald L. Pevsner, Esq., in Docket OST 97-2061.

By:

Francisco J. Sanchez
Assistant Secretary for
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